STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2007
v	No. 266674 Kent Circuit Court
THEODORE LEE LAWTON, Defendant-Appellant.	LC No. 04-005016-FC

Before: Murphy, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

After defendant's first trial ended with a hung jury, defendant was retried and convicted by a jury as charged of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was represented by counsel at his first trial, but represented himself at his second trial. He was sentenced as a habitual offender, second offense, MCL 769.10, to 562 months to 75 years in prison for the robbery conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. For the reasons set forth below, we affirm.

I. Factual Background

The jury convicted defendant of robbing a convenience store, Huck's Corner, in Cedar Springs, Michigan, on April 22, 2004, shortly before 10:00 p.m. Two masked men with guns entered the store, and one fired a single shot that lodged in a cigarette carton near the cash register. They left with $170 in cash. A store customer drove in the direction he believed the robbers went and copied down the license plate number of the only car he came across. It was registered to Suzanne Spicer, who was charged in the offense and testified at trial pursuant to a plea agreement. Spicer testified that she acted as the getaway driver, and that she, defendant, and codefendant Joshua Bushey planned the robbery because they needed money. Spicer identified Bushey as the first robber to enter the store and defendant as the second one.

Defendant and Bushey were arrested the following day. They were apprehended after a brief footchase. Two guns, a nine-millimeter and a Derringer, along with a box of nine-millimeter bullets, were found in defendant and Bushey's apartment after the robbery. Spicer testified that defendant carried the nine-millimeter handgun and that Bushey carried the Derringer during the robbery. A shell casing found outside the store's south entrance was determined to have been fired from the nine-millimeter gun that was found in defendant and

Bushey's apartment, and a bullet recovered from the store was consistent with having been fired from that gun. Photographs obtained from defendant's cell phone were admitted that depicted the nine-millimeter gun and defendant holding the gun. A coat similar to one worn by one of the robbers was also found in the apartment. It contained both defendant's and Bushey's DNA, with defendant being the minor contributor of the DNA on the collar. Two masks matching the descriptions given by Spicer were found along the road near the store. Defendant and Bushey were excluded as donors of the DNA found on the mask allegedly worn by the second robber.

Cell phone records from a phone found on defendant when he was arrested were used to show defendant's whereabouts on the night of the robbery. The locations corresponded with Spicer's account of the evening. A recorded phone call defendant made from jail just after he was arrested was played for the jury. During the call, defendant asked a friend, Lee Blunston, to tell Spicer to leave town so she could not testify against himself and Bushey.

Defendant denied any involvement in the robbery. He stated that he was at his girlfriend's house at the time of the robbery and only found out about it later from Bushey, who said that he and Spicer had robbed the store. Defendant admitted that he helped Bushey hide the guns, but contended that Spicer set him up by identifying him as one of the robbers.

II. Self-Representation

Before defendant's second trial, he requested that he be allowed to represent himself. The trial court granted his motion. Defendant now argues that his waiver of counsel was invalid because the trial court did not substantially comply with MCR 6.005 or the requirements announced in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). This Court reviews de novo the entire record to determine if the trial court's factual findings surrounding a defendant's waiver were clearly erroneous. *People v Willing*, 267 Mich App 208, 218; 704 NW2d 472 (2005).

In Michigan, the right of self-representation is explicitly recognized by our constitution and by statute. Const 1963, art 1, § 13; MCL 763.1. In *People v Russell*, 471 Mich 182, 190-191; 684 NW2d 745 (2004), our Supreme Court outlined the requirements for a valid waiver as follows:

> Upon a defendant's initial request to proceed pro se, a court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.
>
> In addition, a trial court must satisfy the requirements of MCR 6.005(D), which provides in pertinent part as follows:
>
> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

A trial court must substantially comply with these requirements. *Id*. at 192-193.

"Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a brief colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Russell, supra* at 192, quoting *People v Adkins (After Remand)*, 452 Mich 702, 726-727; 551 NW2d 108 (1996), overruled in part on other grounds *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004).

Defendant argues that his waiver was ineffective because the trial court did not specifically advise him of the sentencing risks or adequately question him regarding his understanding of the risks of self-representation. Defendant does not assert that any of the other requirements were not met.

With regard to the dangers of self-representation, defendant contends that the trial court should have advised him more fully, specifically delineating situations that could arise at trial that he might not be able to effectively handle. We disagree. Substantial compliance only requires that the trial court discuss the substance of the *Anderson* and court rule requirements. *Russell, supra* at 191. At the waiver hearing and again on the first day of trial before jury selection began, the trial court warned defendant that he was not trained in the law, that there were "technical" matters that might arise that a trained lawyer would be better able to deal with, and that he was "better off" having an attorney represent him. Defendant stated that he understood these risks, but nevertheless desired to represent himself. In fact, defendant was adamant about representing himself, acknowledging that if he lost, he would have no one to blame but himself. Additionally, defendant acknowledged in letters to the trial court before trial and in his motion to represent himself that he understood the risks of self-representation. In light of the foregoing, defendant clearly waived his right to counsel and his waiver is valid.

With regard to the sentencing risks, defendant asserts that the trial court should have informed him of the ramifications of a conviction while on parole or probation. However, the trial court had no such duty. The court rule only requires that a defendant be advised of the maximum and any mandatory minimum sentences. MCR 6.005(D)(1). The record reveals that defendant was advised at the waiver hearing that the maximum sentence for an armed robbery conviction was life imprisonment, and defendant stated that he understood.

Although the record does not reflect that defendant was advised at the waiver hearing of the mandatory two-year prison term for a felony-firearm conviction, the trial court substantially complied with the court rule. The information listed the penalty for the felony-firearm offense and defendant's waiver of arraignment showed that he received and understood the information. "[T]he effectiveness of an attempted waiver does not depend on what the court says, but rather,

what the defendant understands." *Adkins, supra* at 723. Thus, the fact that the trial court did not specifically state the punishment for a felony-firearm conviction at the waiver hearing is insufficient to defeat substantial compliance with the waiver procedures. *Id*. at 731. Moreover, defendant was adamant in his desire to represent himself despite knowing that he was subject to a life sentence on account of the armed robbery charge. Accordingly, we conclude that the trial court substantially complied with the requirement to advise defendant of the dangers and disadvantages of self-representation and did not clearly err in finding that defendant knowingly, voluntarily, and intelligently waived his right to counsel.

III. Motions to Suppress

A. Photographs

Defendant contends that the trial court erred in denying his motion to suppress photographs retrieved from his cell phone. This Court reviews de novo a trial court's ultimate decision on a motion to suppress, but a trial court's factual findings are reviewed for clear error. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). A finding is clearly erroneous if it leaves this Court "with a definite and firm conviction that the trial court made a mistake." *Id.* at 564.

Defendant says that Detective Johnson lied in his search warrant affidavit when he stated that Lee Blunston told him about the photographs, because Blunston denied doing so and because the detective's original report of his interview with Blunston did not mention the photographs. If false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause. *Franks v Delaware*, 438 US 154, 156; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Melotik*, 221 Mich App 190, 200; 561 NW2d 453 (1997). Here, however, the trial court determined that the affidavit was valid because the judge believed that Detective Johnson was truthful and more credible than Blunston with respect to this matter. The trial court's resolution of a factual issue is entitled to deference, particularly where the issue involves the credibility of conflicting witnesses. *People v Geno*, 261 Mich App 624, 629; 683 NW2d 687 (2004). Giving proper deference to the trial court's credibility determination, we find no clear error in the trial court's decision to deny defendant's motion to suppress the photographs.

Defendant further argues that the photographs were irrelevant and unduly prejudicial. At his second trial, defendant denied that the guns were his and elicited testimony from witnesses that they never saw defendant carry a gun. Also, Spicer testified that defendant loved his nine-millimeter handgun. The photographs countered defendant's position and supported Spicer's testimony, and they were relevant to link defendant to the nine-millimeter gun used in the robbery. Thus, they were relevant. MRE 401. Nor were they unfairly prejudicial; rather, they were extremely probative of the fact that defendant had handled and liked the gun. MRE 403.

Defendant further asserts, incorrectly, that the photographs were inadmissible character evidence. We disagree. They were offered not to show character, but rather to provide a direct link between defendant and the nine-millimeter gun used in the robbery. *People v Houston*, 261 Mich App 463, 468-470; 683 NW2d 192 (2004). Accordingly, we conclude that the trial court did not err in denying defendant's motion to suppress the photographs.

B. Cell Phone Recording

Defendant says that his recorded phone call to Blunston should have been suppressed because Detective Johnson purposefully altered the recording to include only those portions favorable to the prosecution. At his first trial, defendant moved to suppress the recording because he argued that its incompleteness would prevent effective cross-examination of Blunston. However, defendant did not argue that suppression was warranted because Detective Johnson intentionally erased exculpatory portions. Therefore, this issue is not preserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Normally, we review unpreserved issues only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). At defendant's second trial, however, when the prosecutor moved to admit the recording, defendant specifically stated that he had no objection. Defendant's affirmative approval of this evidence extinguished any error and there is no error to review. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).[1]

IV. Prosecutorial Misconduct

Defendant avers that the prosecutor committed misconduct by knowingly presenting perjured testimony of several witnesses. Defendant did not object to the witnesses' testimony or the prosecutor's conduct either at trial or in an appropriate posttrial motion. Therefore, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. "Prosecutors . . . have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998).

Defendant asserts that Spicer perjured herself when she (1) identified defendant and Bushey on the videotape of the robbery because she initially identified the first robber as defendant, but later said it was Bushey, and (2) provided inconsistent statements regarding where the masks used in the robbery were made. The mere fact that Spicer changed her identification of the first robber and that her trial testimony varied slightly does not establish that Spicer testified falsely or committed perjury. The only basis for defendant's assertion that Spicer lied

[1] Defendant argues that his original defense attorney was ineffective for failing to file a motion to suppress the evidence seized from his apartment pursuant to a search warrant. Defendant asserts that the warrant was invalid because it was based on a false affidavit. To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). We reject defendant's argument because, after defendant's first trial ended in a hung jury, defendant chose to represent himself, because he did not believe that defense counsel advocated vigorously enough on his behalf. If defendant believed that a motion to suppress should have been filed, he could have done so before the second trial began. Furthermore, as we concluded in codefendant Joshua Bushey's appeal in Docket No. 264849, there has been no showing that the affidavit was based on false information, or that material information was omitted from the affidavit.

both times that she identified the robbers on the video is defendant's contention that he was not involved. This contention does not establish that her testimony was false. With regard to where the masks were made, Spicer explained that the police must have misunderstood her when they wrote in her confession that the masks were made in the car. She testified consistently at both trials that the masks were made at the apartment. We find no evidence that Spicer perjured herself.

Defendant asserts that one of the robbery victims, Michelle Merritt, perjured herself when she testified inconsistently regarding the color of the robbers' guns and what clothing they wore. Merritt explained at the second trial that she attended a funeral on the day she testified at the preliminary examination and was not clear-headed. She said that she had time to reflect and think clearly between the preliminary examination and the first trial. Her testimony at both trials was consistent. Any inconsistency in Merritt's statements regarding the robbers' clothing do not establish that she was lying, particularly in light of her claims that the testimony came from her own memory. Defendant presents no basis for his assertion that the new details could not have come from Merritt's memory.

Nor has defendant shown that another robbery victim, Shannon Kolehouse, lied. Although Kolehouse did not identify the race of the second robber in her police statement, when questioned by the police, she stated that both robbers were African-American based on their skin color, which Deputy Morey wrote on the back of her statement. Kolehouse's testimony regarding the robbers' race was consistent. Also, although she previously testified that the robbers' masks had holes cut out at the mouth, she explained that she realized her mistake when she saw the robbery video at the first trial.

Defendant further asserts that Detective Mark Burns committed perjury when he testified regarding his surveillance of defendant and Bushey's apartment on the morning of their arrest. Detective Burns testified that there was no activity at the apartment until noon when defendant and Bushey exited the apartment. His report stated that a red pickup truck arrived at 11:50 a.m., that Bushey exited, entered the apartment, and reemerged with defendant a few minutes later. We find no evidence that Detective Burns intentionally altered his testimony. He stated that he testified from his memory, but did not refute his statements in his report. Moreover, his testimony was consistent with the observations he noted in his report in that there was no activity at the apartment until approximately noon. Accordingly, there is no support for defendant's argument that the prosecutor suborned perjury.

Defendant also argues that he was denied a fair trial by the combined effect of police and prosecutorial misconduct. Having already addressed and rejected defendant's various claims of misconduct, we similarly reject this claim of error.

V. In-Court Identification

Because defendant did not object to Spicer's in-court identification of defendant as one of the robbers on the store video, this next issue is unpreserved and our review is limited to plain error affecting substantial rights. *Carines*, *supra* at 763.

At trial, the robbery video was played during Spicer's testimony. She identified defendant as the second robber based on his dress and demeanor, consistent with her previous

identification to the police the second time she was shown the video. Defendant argues that this identification should not have been admitted because it was clearly the by-product of Detective Johnson's misconduct. However, there was no evidence that Detective Johnson instructed Spicer to identify one robber or the other as defendant. Spicer explained at trial why she initially misidentified the first robber as defendant, stating that when she was sober and concentrated on the robbers' dress and demeanor, she realized her mistake. We find no plain error.

VI. Motion for Directed Verdict and Sufficiency of the Evidence

This Court reviews a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). In reviewing the sufficiency of the evidence, this Court similarly must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

"The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant was armed with a weapon described in statute." *Carines, supra* at 757 (citation omitted); MCL 750.529. The elements of felony-firearm are: (1) the possession of a firearm and (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The identity of defendant as one of the robbers was the principal issue at trial.

Although defendant alleges that many of the witnesses were not credible, a trial court may not determine the weight of the evidence or the credibility of the witnesses, regardless of how inconsistent or vague the testimony was. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Rather, questions regarding witness credibility are left to the trier of fact. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998).

Here, Spicer identified defendant as one of the robbers and stated that he had the nine-millimeter handgun that was used during the robbery. Photographs of the gun and of defendant holding the gun were found on defendant's cell phone. The gun was later found in defendant's dining room closet. The cell phone records indicated that defendant's and Bushey's cell phones were silent during the time of the robbery and their activity confirmed Spicer's account of their whereabouts that evening. Additionally, the letter defendant wrote to Spicer, the phone call he made to Blunston, and his flight from the police was circumstantial evidence of defendant's guilt. "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime." *Carines, supra* at 757 (citation omitted). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant argues that the phone records show that he and Bushey were six miles apart at the time. However, evidence was presented regarding the cell towers' range, the fact that calls

may bounce to a farther tower, and the location of the different towers due to the different cell phone companies. It was for the jury to determine how much weight to give the cell phone records. Defendant also asserts that certain evidence contradicted Spicer's claim that defendant was one of the robbers. However, in determining sufficiency of the evidence, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). Defendant also contends that the fact that the footwear impression at the robbery scene did not match any of his shoes proved that he was not involved. However, this only proved that the impression at the scene did not match any shoes found in defendant's apartment. Again, it was up to the jury to determine what weight, if any, to give this evidence. *Id*. Additionally, the fact that defendant denied involvement was a factor for the jury to consider, but the jury was not obligated to believe him.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to justify sending the charges to the jury and to support defendant's convictions.

VII. Sentencing Issues

Though defendant asserts that the trial court incorrectly scored offense variables 1, 4, 7, and 14 for his armed robbery conviction, he presents no argument in support of his position that offense variables 4, 7, and 14, were improperly scored. Therefore, he has waived review of these claims. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Because defendant did not object to the scoring of OV 1 at sentencing, we review this scoring issue for plain error. *Kimble, supra* at 312.

Defendant argues OV 1 was improperly scored at 25 points because one of the victims, Merritt, testified at the preliminary examination that neither robber fired a shot at her. OV 1 provides, in pertinent part, that 25 points should be scored if a firearm was discharged at or toward a person. MCL 777.31(1)(a). The preliminary examination testimony is not controlling. Rather, the facts adduced at trial are pertinent. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The evidence at trial showed that a bullet was fired and lodged in a display case that was located near several of the victims. This was sufficient to support a score of 25 points for OV 1. Thus, there was no plain scoring error.

Finally, relying on *United States v Booker*, 543 US 220; 125 S Ct 738, 160 L Ed 2d 621 (2005), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that his due process rights and right to a jury trial were violated because the trial court considered facts not found by the jury when scoring the sentencing guidelines. We disagree. Our Supreme Court has determined that the principles announced in *Booker* and *Blakely*, which prohibit a court from increasing a defendant's maximum sentence on the basis of facts not found by a jury, do not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Deborah A. Servitto